

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI**

BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 1853/MUM/2018
Assessment Year: 2012-13**

M/s Vritti Impex Pvt. Ltd., 60, Ground Floor, Ram Mahal Society, Opp. Mahim Rly. Station, Senapati Bapat Marg, Mahim (W), Mumbai - 400031 PAN: AABCV3176C	Vs.	The ACIT Circle – 11(3)(2), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

Assessee by : Shri K. Gopal/Tanmay Phadake (AR)
Revenue by : Shri Rajeev Gubgotra (DR)

Date of Hearing: 07/08/2019
Date of Pronouncement: 30/09/2019

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 10.03.2017 passed by the Commissioner of Income Tax (Appeals)-18 (for short 'the CIT(A), Mumbai, for the assessment year 2012-13, whereby the Ld. CIT(A) has dismissed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. The brief facts of the case are that the assessee engaged in the business of manufacturing plywood of various grades and exporting the same, filed its return of income for the assessment year under consideration declaring total income of Rs. 43,72,130/-. Since the case was selected for scrutiny, the AO issued notice u/s 143(2) and 142(1) of the Act. In response thereof, the authorized representative appeared before the AO and furnished the details and submissions.

3. It was noticed that the assessee had debited an amount of Rs. 1,60,19,775/- on account of commission paid on sales. Accordingly, the assessee was asked to furnish the details of commission paid along with tax deducted out of such payments, to explain the basis for making such commission and to furnish evidence regarding nature of services rendered. In response to the same the assessee submitted that commission of Rs. 1,47,50,845/- was paid to Mrs. Nathalie Abate however no TDS was deducted on the same. The assessee submitted copy of agreement entered with Mr John Smith and letter from Mr. John Victor Smith requesting the assessee to estimate the commission amount on export sales to his wife Mrs. Nathalie Abate. The assessee also furnished copy of Ledger account, statement of account from Union Bank of India reflecting the said payments along with a copy of letter from Mr. John Victor Smith requesting the assessee company to remit the commission amount on export sales to Forest Timber Trade Ltd., MLE Sophie Krebs, Yossi Nagel and Van Den Haak Franciscus. However, the AO following the stand of the Department taken in the assessee's own case for the assessment year 2008-09, 2009-10, 2010-11 and 2011-12, disallowed the commission of Rs.1,47,50,845/- paid to Mr. John Victor disallowed the same under section 37(1) and section 40(a)(ia) of the Act and added back the said amount to the income of the assessee.

4. The assessee challenged the assessment order before the CIT(A). The Ld. CIT(A) after hearing the assessee dismissed the appeal of the assessee and not only confirmed the addition made by the AO but enhanced the addition by Rs. 12,68,930/- holding that the AO has not included the said amount paid to Mrs. Nathalie by the assessee. Accordingly, the Ld. CIT(A) directed the AO to make addition of Rs. 1,60,19,775/- holding that the orders relied upon by the appellant in respect of earlier assessment years distinguishable on facts. The assessee is in appeal against the said order passed by the Ld. CIT(A).

5. The assessee has challenged the impugned order passed by the Ld. CIT(A) on the following effective grounds:-

1. *“On the facts and in the circumstances of the case and in law, the Learned CIT (A) has erred in upholding the addition of commission paid of Rs. 1,47,50,845/-.*
2. *On the facts and in the circumstances of the case and in law, the Learned CIT (A) has erred in enhancing the assessment by adding commission of Rs. 12,68,930/- and thereby computing the income at Rs. 2,04,04,905/-.”*

6. There is a delay of 241 days in filing the present appeal. The assessee has filed an application for condonation of delay supported by affidavit sworn by the Managing Director of the company stating therein that during appellate proceedings before the Ld. CIT(A), he had certain differences with respect to the professional services rendered by its tax consultant Mr. Mahesh Tejwani. When the Ld CIT(A) passed the impugned order the assessee company handed over the copy of order to its tax consultant and brought to his notice that the case has gone against the assessee in spite the decision of the ITAT in favour of the assessee on identical issue in assessee's case for the assessment year 2009-10. The tax consultant assured the assessee that an appropriate remedial measure will be taken to rectify the mistake in the order. However, after lapse of 6/7 months the assessee came to know that the consultant had not taken any step to file appeal before the Tribunal. Thus the assessee sought the help of another tax consultant and filed the present appeal. In the light of the aforesaid facts, the Ld. counsel for the assessee submitted that since the assessee was prevented by sufficient cause from filing the present appeal within the prescribed period, the request of the assessee may be allowed and delay of 241 days may be condoned and the assessee may be permitted to argue its case on merits. The Ld. counsel relied on the judgments of the Hon'ble Supreme Court in the case of *Collector Land Acquisition vs. Katiji*, 167 ITR 471 (SC) and *Improvement Trust vs. Ujagar Singh*, Civil Appeal No 2395 of 2008 to substantiate the claim of the assessee.

7. Per contra, the Ld. DR opposed the application for condonation of delay on the ground that the application has been filed in a mechanical manner as the assessee has not produced any evidence to establish that there was a

reasonable cause for not filing the appeal within the limitation period. The Ld. DR further submitted that since the assessee has failed to prove sufficient cause for condonation of delay in filing the present appeal, the prayer of the assessee is liable to be rejected.

8. We have heard the rival submissions and also gone through the material on record including the case relied upon by the parties. Sub-section 5 of section 253 of the Income Tax Act provides that the Tribunal may admit appeal or permit filing of memorandum of cross-objection of respondent after expiry of relevant period of limitation referred to in sub-section 3 and 4 section 253, if it is satisfied that there was sufficient cause for not presenting the appeal within the limitation period. Expression "sufficient cause" appearing in this section has also been used in section 5 of Indian Limitation Act, 1961. This expression has come for consideration before the Hon'ble High Courts as well as before the Hon'ble Supreme Court, and the Hon'ble Courts are unanimous in observing that whenever such issue comes for consideration before adjudicating authority, then "sufficient cause" should be considered with justice oriented approach. In the case of *Collector Land Acquisition vs. Mst. Katiji & Others*, 1987 AIR 1353, the Hon'ble Supreme Court has held as under:

"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. *There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.*

6. *It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”*

9. Similarly, in the case of *Improvement Trust Ludhiana vs. Ujagar Singh and others* (supra), the Hon’ble Supreme Court has held that unless *mala fides* are apparent from the conduct of the parties, as a general rule delay should be condoned and an attempt should be made to allow the matter to be contested on merits rather than to through it on technical grounds. In the present case we do not find any *mala fides* on the part of the assessee in not filing the appeal within the limitation period. Hence, respectfully following the ratio laid down by the Hon’ble Supreme Court in the cases discussed above, we allow the application for condonation of delay filed by the assessee in the interest of justice and permitted the Ld. counsel for the assessee to argue the case of the assessee on merits.

10. At the outset, the Ld. counsel for the assessee submitted that the “F” Bench of the ITAT Mumbai has decided the identical issue in favour of the assessee in assessee’s own case ITA No. 661/M/2012 for the assessment year 2008-09. The Department preferred appeal before the Hon’ble High Court against the order passed by the ITAT and the Hon’ble High Court dismissed the revenue’s appeal and confirmed the findings of the Tribunal. The Ld. counsel further submitted that since the Hon’ble High Court has confirmed the order of the ITAT allowing the claim of the assessee, the order passed by the Ld. CIT(A) in the present case is liable to be set aside.

On the other hand the Ld. CIT(A) fairly admitted that the Hon’ble High Court has dismissed the appeal filed by the revenue against the order of the Tribunal pertaining to the assessment year 2008-09, however, supported the findings of the authorities below.

11. We have heard the submissions made by the parties and carefully perused the material on record including the orders passed by the coordinate Bench in assessee's case pertaining to the earlier years and the order of the Hon'ble High Court passed in assessee's case for the assessment year 2008-09 discussed above. The coordinate Bench has decided the identical issue in favour of the assessee holding as under:-

"7.1. On the other hand, Ld Counsel brought our attention to the replies given by the assessee before the CIT (A) which are narrated in pages 2 to 8 of the impugned order. He read out the contents of para 1.5 of CIT (A)'s order, which provides the reasoning for concluding that the claim of the assessee is allowable u/s 37 of the Act. In view of the relevance of the same, we reproduce the said para 1.5 which is as follows.

"1.5. I have considered the submissions of the Ld Counsel, the remand report of the AO and the reply of the assessee to the remand report of the AO and in this case, it is clear that he appellant has made the payment of Rs. 1,13,24,831/- to the said Mr. John Victor Smith / Jonathan Smith and all the payments have been made through banking channel – which during the course of appellate proceedings, the assessee proved by filing the copy of the bank statements in question – which was made available to the AO for his comments and it is seen that the payments have been credited in the bank account of Mr. John Victor Smith / Jonathan Smith and therefore, the fact of payments having been made by the appellant and having been received by Mr. John Victor Smith/ Jonathan Smith stands prove beyond doubt. Further, the fact that it is a percentage of the sale is also not disputed the amount of Rs. 1,13,24,831/- is 12% of the total export sales. This clearly shows that Mr. John Victor Smith / Jonathan Smith has received the payment of Rs. 1,13,24,831/- as a fixed percentage of the sale – there is a direct correlation and nexus between the export sales made by the appellant and the commission paid by the appellant to Mr. John Victor Smith / Jonathan Smith. Thus, the objections of the AO are unwarranted on the given facts of the case – since, both the payment and the receipt of this amount in Canada stands clearly established. Thus, when the genuineness of the

payment cannot be impeached – then it has to be allowed u/s 37 because the necessity of making of this payment cannot be examined by the AO. Once, its genuineness is established as above. Hence, I direct the AO to allow this payment of commission of Rs. 1,13,24,831/- u/s 37 of the IT Act.

The objection of the AO as to admission of the details relating to identity of Mr. John Victor Smith / Jonathan Smith and the bank account details is overruled because it is the settled law that an Appellate Authority can always entertain evidence which is necessary to decide the issue in appeal – especially evidence which has a direct bearing on the dispute:-

(i) CIT vs. Smt. Prabhavati Shah 231 ITR 1 (Bom)

(ii) CIT vs. Suretech Hospital & Research Centre Ltd [2007] 293 ITR 53 (Bom)

Thus, the same has been admitted and considered. Hence, this ground of appeal is allowed, as stated above.”

8. Considering the above, we find that the assessee discharged his onus validly, therefore, the conclusions given by the CIT (A) does not call for any interference.”

9. Similarly, on the issue of applicability of provisions of section 40(a)(ia) of the Act r.w.s. 9,195 and 200 of the Act, we find that the Revenue has failed to establish that the commission paid by the assessee is chargeable to tax in the hands of Mr John Victor Smith in India. In such circumstances, the explanation given by the assessee which was extracted in paragraph 1.6 of the impugned order, helps the assessee. As such, it is a decided position at the level of the Apex Court that for invoking the provisions of section 195 of the Act, the revenue has to establish that the income should be chargeable to tax under the act in the hands of the recipient, failing which, failing which, the provisions of section 40(a)(ia) of the act have no application. Therefore, we find that the order of the CIT a is reasonable on this ground also and it does not call for any interference. Accordingly grounds raised by the revenue are dismissed.

12. As pointed out by the Ld. counsel for the assessee, the Hon'ble High Court has dismissed the appeal filed by the department against the decision of the Tribunal rendered in assessee's case for the assessment year 2008-09 on 26th April, 2016. We further notice that in the mean time the coordinate

Bench has decided the identical issue in favour of the assessee in assessee's case pertaining to the assessment year 2009-10 and 2010-11. Since, the impugned order passed by the Ld. CIT(A) is not in accordance with the decision of the Hon'ble High Court rendered in assessee's case for the assessment year 2008-09, we allow the appeal of the assessee and set aside the findings of the Ld.CIT(A). Accordingly, we direct the AO to allow the claim of the assessee.

13. Since, we have set aside the impugned order passed by the Ld. CIT(A) we do not deem it necessary to adjudicate ground No 2 of the appeal which is connected to ground No 1 of the assessee's appeal.

In the result, appeal filed by the assessee for assessment year 2012-2013 is allowed.

Order pronounced in the open court on 30th September, 2019.

Sd/-
(RAJESH KUMAR)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 30/09/2019

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai